

No 627.

Loan of moveables found to exclude the presumptive title of property of a defunct dying in possession of them, the loan being proveable by witnesses.

1678. January 17.

GEDDES against GEDDES.

MARION GEDDES pursues James Geddes for re-delivery of the furniture of a chamber lent by her to his brother, and intromitted with by the defender after his death. The defender *alleged*, Absolvitor, because he had confirmed these goods as executor to his brother, who died in possession thereof, from which property is presumed, against which witnesses cannot be received.

THE LORDS repelled the defence, and found, that the presumptive title of property was excluded, by offering to prove, that the goods were delivered by way of loan; and that the same was probable by witnesses.

*Fol. Dic. v. 2. p. 270. Stair, v. 2. p. 592.*

1679. November 6.

BRUCE against DOUGLAS.

No 628.

What proof of intromission by an executor beyond the inventory and estimate?

ALEXANDER BRUCE as executor-dative *ad omnia et male apprehensata* to ——— Williamson, pursues Anna Douglas, his relict and principal executrix, for certain goods and sums intromitted with by her, and omitted in her inventory, or misappropriated; which being referred to her oath, she depones, that she caused some skilful persons make an estimate of the corns in her husband's barn-yards, and confirmed them accordingly, and that they only arose to six bolls of oats, and two bolls of bear more, and that she confirmed a part of two bonds due by the Lord Arbuthnot to her husband, and that both she and the Commissary knew, that by payments made to her husband, and compensation, there was no more remaining than the sum she confirmed. At advising of the oath, it was *alleged*, that her oath proved her meddling with the whole corns and the bonds, and that the estimate could not liberate her, not being by the proof, but by guess; and that the quality adjected, concerning the payment and compensation, could not be proved by her oath, for if thereupon she gave up the bonds, or discharged Arbuthnot, the pursuer being a creditor would be excluded by collusion, and therefore she ought to have confirmed all; and if, upon her pursuit, Arbuthnot's defence upon payment or compensation had been proved, it would have liberated both her and him. But an executor's oath of knowledge can prejudice no creditor. It was *answered*, That before confirmation, the executrix could not cast the proof, and so could do no more but make an estimate, which would have made her liable, though it had come short; and as to the bonds, the oath of an executor is only *ad vitandum dolum*, and the executor could not depone the inventory was true, when she knew a part paid, neither had she intromitted with any more than what she confirmed, nor could she discharge Arbuthnot effectually, so that the pursuer ought to pursue him for the remainder of the bond, if any be.